

## MEMORANDUM

TO: Board of Environmental Protection

FROM: Judy Gates, Bureau of Land & Water Quality, Augusta

DATE: September 22, 2005

RE: Proposed changes to Chapter 335, Significant Wildlife Habitat, and Chapter 375, No adverse environmental effect standard, Section 15, Wildlife & Fisheries: Post to Hearing  
\*\*\*\*\*

Statutory and Regulatory Reference: The applicable regulatory framework for this rule is the Natural Resources Protection Act (NRPA), 38 M.R.S.A. § 480-A to 480-Z, and the Site Location of Development Law (Site Law), 38 M.R.S.A. § 375 (15).

Scope: Chapter 335 provides standards for activities subject to the NRPA that have the potential to impact significant wildlife habitat as defined in 38 M.R.S.A. § 480-B (10). Chapter 375, Section 15, contains standards for the protection of wildlife and fisheries habitat for projects subject to the Site Law.

History: When the NRPA was enacted in August 1988, it included protection for significant wildlife habitat, which was defined in the law, to the extent such areas were mapped or within another protected natural resource. A series of changes have been made to the original definition over the last 17 years. Most relevant to the proposed rule changes was the addition of “significant vernal pools” as a type of significant wildlife habitat in 1995. Additional language required that, to be regulated under the NRPA, these pools would have to be identified and mapped in a specific location by the Maine Department of Inland Fisheries & Wildlife (MDIF&W). DEP would then have to adopt these maps through rulemaking. [See PL 1987, ch. 809, Sec. 2 (in part) codified at 38 MRSA 480-I(1)]. No additional resources were allocated to MDIF&W to accomplish mapping of significant wildlife habitats and the costs proved prohibitive, and so to date only seabird nesting island maps have been adopted by the tow departments. The NRPA definition of significant wildlife habitat currently reads as follows.

“Significant wildlife habitat” means the following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal lists of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; high and moderate value waterfowl and wading bird habitats, including nesting and feeding areas as defined by the Department of Inland Fisheries and Wildlife; critical spawning and nursery areas for Atlantic salmon as defined by the Atlantic Salmon Authority; shorebird nesting, feeding and staging areas and seabird nesting islands as defined by the Department of Inland Fisheries and wildlife; and significant vernal pools as defined and identified by the Department of Inland Fisheries and Wildlife. For purposes of this

subsection, "identified" means identified in a specific location by the Department of Inland Fisheries and Wildlife.

Purpose: Through Public Law 116 (LD 261, copy attached), the 122<sup>nd</sup> Maine State Legislature made the following changes to the NRPA at the request of the department and Maine Audubon, which sponsored a companion bill to the department's.

1. Maine Forest Service's language defining timber harvesting activities was incorporated into the NRPA definition of forest management activities;
2. The statutory requirement to map significant vernal pools, shorebird and wading and waterfowl habitats as we do any other wetland was removed; and
3. The exemption for the filling of up to .10 of an acre of significant wildlife habitat was removed.

This legislative action also required that the department establish definitions and standards through rule for significant vernal pools, high to moderate value shorebird feeding, nesting, and staging habitat, and high to moderate value wading and waterfowl habitat. Chapter 335 is the existing rule which governs activities associated with seabird nesting islands and under which these three habitats will be defined. The changes in Chapter 375, Section 15, are proposed solely to increase consistency between the two state regulatory programs. Simultaneous to this rulemaking process, MDIF&W is undergoing its own process before its Advisory Council to adopt identical definitions and criteria for these three significant wildlife habitats. The rules the Board is asked to post to public hearing today also incorporate specific measures and protections for both the pools and applicants required by the Natural Resources Committee of the Maine State Legislature.

Environmental Issues: In the 10 years since the significant vernal pool language was added into the definition of significant wildlife habitat, a body of research has shown that mapping is not likely to be the most effective tool for identifying and protecting this type of habitat. The largest roadblock to MDIF&W's mapping efforts is the lack of resources, both monetary and personnel. But, even if the mapping were fully funded at a cost of millions of state dollars, differential regulation based on geography is inherent. Most pools occur in forested areas and so aerial mapping in northern parts of the state with primarily coniferous canopy cover would be limited to impossible, while pools in southern Maine could potentially be located during leaf-off seasons, increasing the regulatory burden for the southern part of the state. Any mapping effort would also fracture scarce dollar resources into areas where projects may or may not be proposed, and on the ground confirmation would require access to private property.

Scientists and resource managers are now more than a decade into the science and management of vernal pools. There are a number of very successful training and education programs in place around the state that have helped the public better understand the importance of these resources. Since 1995, DEP has worked with an interagency work group that included wetland scientists from the University to develop and refine criteria and a definition for significant vernal pools that will be established through rule and will mirror those presently in use by wetland delineators throughout New England. We now have clear criteria with which to identify them on the ground, just like any other wetland. The methods are valid, reasonable, and field tested. For the regulation of development, it is no longer necessary to go through the mapping requirement to fairly regulate these resources.

Through a friendly amendment to LD 261, Maine Audubon proposed applying this same logic to identifying high to moderate shorebird and wading and waterfowl habitats. What these three types of wildlife habitat have in common is that they are all wetland-based, and target species rely heavily on associated wetland or upland habitat management areas. However, contrary to significant vernal pools,

MDIF&W has been able to use aerial resource data to identify high to moderate shorebird and wading and waterfowl habitats on GIS layers. Identifying these habitats based on criteria rather than on their presence on a paper map allows both state agencies and applicants the flexibility to fine tune habitat locations on the ground, eliminating areas that do not have specific characteristics when field checked. By making these changes related to significant wildlife habitat in both the NRPA and Site Law, we will increase consistency in how the department regulates wetlands of special significance, making regulatory oversight more predictable, and affording these state resources the protection we are directed to provide.

Department Recommendation: The department requests permission to post proposed changes to Chapter 335, Significant Wildlife Habitat, and Chapter 375, Section 15, Wildlife & Fisheries to public hearing. The department recommends that the public hearing be held on October 20, 2005 at 1:30 P.M.

Estimated Time of Presentation: Approximately 30 minutes.